Submission No 17

INQUIRY INTO FURTHER INQUIRY INTO THE REGULATION OF BUILDING STANDARDS

Organisation: Randwick City Council

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NSW Legislative Council – Public Accountability Committee

Further Inquiry into the Regulation of Building Standards

25 August 2021

Randwick City Council
a sense of community

Thank you for providing the opportunity to comment on these issues which are of significant importance to the community, consumers and local government.

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Roman Wereszczynski is qualified Building Survey and Registered Certifier (Building Surveyor – Unrestricted) with over 30 years experience in Local Government. During this period Roman has been a member of both the Accreditation and Disciplinary Committees under the former *Building Professionals Act 2005,* and is a current member of the Department of Planning Industry and Environment – Complying Development Expert Panel and advisor to Local Government NSW.

Preamble

The ‘building process’ in NSW is overly complex. This is due to a confusing multi-layered ‘approval’ process where proponents, consent authorities, regulators and the range of building professionals involved in the ‘building’ process have to navigate through the ‘plethora’ of incessantly changing state and local planning controls that even the most experienced practitioners find difficult to grasp.

Then there is the ‘building certification process’, which has been subject to continual legislative ‘tinkering’ under the disguise of reform has done little but add even more complexity to fix a building certification system which to this day remains flawed. Until there is a single piece of over-arching building legislation that regulates all of the aspects of building construction and certification, distinct and discrete from planning legislation, there will continue to be a necessity to further amend and add to the current legislative clutter that exists to regulate the building sector.

To illustrate the ubiquitousness of changes constantly being made to NSW planning and building regulations, while this submission was being prepare the DPIE released the draft *Environmental Planning and Assessment Regulation 2021,* for comment. The draft Regulation, which will replace the existing 2000 Regulation, is 195 pages in length and to assist explaining what it will do, the DPIE has provided a Regulatory Impact Statement and no less than 5 Fact Sheets so that the detail of the new Regulation can be readily understood.

Notably and conspicuously absent from the draft Regulation are the provisions that provide for the ‘certification’ of development carried under the *Environmental Planning and Assessment Act 1979,* which will be contained in the yet to be made *Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021*. Whilst we do not know what this new Regulation will contain, the notion that, on top of the recent suite of ‘building’ reforms, this will reduce the system’s administrative burdens, increase procedural efficiency and establish a simpler, more transparent ‘planning’ system which will still include the way in which buildings are constructed and certified, is simply not an accurate reflection of how the ‘system’ works or how it is viewed in reality. As one accredited certifier (Building Surveyor – Unrestricted), who has been running a successful certification practice for over a decade, recently said: “I’m getting out mate, it’s too bloody hard.”

There is the real danger that should the above sentiments become more widely held throughout the building certification profession, there will come a point in time, we suspect in the not too distant future, that the ‘system’ will have so many layers and be so complex that it will only be the large building certification consultancy firms with the means to have ‘on-staff’ the requisite legal, town planning, design, engineering and building certification personnel that will be able to operate in this environment. Should this eventuate we will see the ‘monopolisation’ of the building certification market putting further upward costs pressures on an already strained sector. This will, of course, result in increased approval, certification and building costs borne by the consumer. So much for cutting ‘red tape’ and reducing ‘costs’. The current Planning and Certification regime does exactly the opposite.

The competence and experience of certifiers varies significantly and whilst there are many very competent professional building certifiers operating in businesses, there still remains many other certifiers that, in my view appear to lack these attributes. Some certifiers do not appear to understand that they are supposed to be independent public officials and instead facilitate questionable practices which undermine the integrity of planning and certification processes.

Whilst the recent reforms have rightly concentrated on ‘reforming’ the way larger scale residential developments are constructed, there is also an urgent need to reform the way that smaller scale Class 1 and 2 housing development is carried out. It is our experience that the certification process for this type of development, given the exponential growth of the complying development approval pathway whereby a certifier issues the ‘planning approval’ (i.e. the Complying Development Certificate) then becomes the certifying authority for that development, is becoming more problematic. The current system allows this type of development to be approved, built and certified in a regulatory vacuum devoid of any meaningful oversight to ensure a compliant quality housing product. Again, the culprit is a flawed system.

The Inquiry's Terms of Reference

1. That the Public Accountability Committee inquire into and report on:

(a) the efficacy and adequacy of the government's regulation of building standards and specifically,

(i) the cost, effectiveness and safety concerns arising from the use of flammable cladding,

(ii) private certification of and engineering reports for construction projects, and

(b) any other related matter.

2. That the committee report by 25 November 2021.

Introduction

Since the Public Accountability Committee's initial inquiry into the regulation of building standards, building quality and building disputes in 2019 there has been significant reform to the regulatory landscape of the construction industry in NSW, which have included:

- The appointment of Mr David Chandler OAM as the NSW Building Commissioner.
- The introduction of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*, which commenced on the 1 September 2020.
- The *Design and Building Practitioners Act 2020,* which commenced on the 1 July 2021.
- The *Building and Development Certifiers Act 2018,* which commenced on the 1 July 2020

In addition, significant work has been undertaken by the NSW Cladding Taskforce and the Cladding Product Safety Panel, including:

- The Establishment of the Cladding Support Unit.
- Cladding Product Safety Panel Report to Government in March 2021.
- The commencement of Project Remediate.

It is envisaged that many of the above reforms, which have been introduced out of necessity to provide greater oversight of the construction industry, will over time have a positive impact in the delivery of improvements to how the industry operates in NSW. However, given the complexity of these reforms and that they are still in their infancy it is difficult to quantify efficacy at this point in time. As such, the focus of this submission is directed to articulating Council officers' views of the broader development and building certification regulation challenges faced by Local Government having regard to the current Inquiry's Terms of Reference.

Terms of Reference

(a)(i) - The efficacy and adequacy of the government's regulation of building standards and specifically - the cost, effectiveness and safety concerns arising from the use of flammable cladding

Comments

The use of combustible cladding has led to a crisis for building and apartment owners across the world. In Australia, each State has its own cladding remediation process incorporating different regulatory processes, funding models and design requirements. At the outset of this 'crisis', now a good number of years ago, a centralised National remediation approach would have been a far better solution than what we now have, but sadly that opportunity has long since passed.

Effectively, in NSW the cladding remediation process is still in, what we would call, the administrative stage. That is to say that most of the 'work' done so far has been associated with identifying the buildings where the non-compliant products have been used, how it should be removed and replaced and how that should be funded.

Whilst the NSW Cladding Taskforce has recently established a process for the remediation of designated 'high-risk' buildings, it relies very heavily upon each affected local council, many of which simply do not have the resources or specialist technical expertise to assess and manage the remediation (or acceptance) of combustible cladding on these buildings.

The NSW government was slow in its response to provide guidelines to assist Council investigations which in many cases were well underway by the time that guideline was presented. Even when it was released, the guide was presented as matters for consideration in any combustible cladding assessment and did little to establish an ultimate acceptability criteria which in turn created confusion amongst Councils and fire engineers and restricted development of consistent State-wide assessment protocols.

Project Remediate is a welcome initiative for these high-risk residential buildings, however this does not address, nor assist local Councils to address (as may be required), the high number of buildings throughout NSW as identified in the NSW Cladding Register.

The conservative replacement strategy adopted by Project Remediate, also does not appear to align with the risk based approach, which was already being applied by many Councils and Fire Engineers in accordance with the NSW Guide for the assessment of buildings with combustible cladding.

(a)(ii) - The efficacy and adequacy of the government's regulation of building standards and specifically - private certification of and engineering reports for construction projects

Comments

Notwithstanding the appointment of the NSW Building Commissioner, the introduction of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*, the *Design and Building Practitioners Act 2020* and the *Building and Development Certifiers Act 2018,* the system under which buildings are certified in NSW has not, fundamentally, changed since the Public Accountability Committee's initial Inquiry in 2019. True, there is a new Regulator and a string of new legislation with much needed teeth. However, apart from added complexity, the operation of these additional layers of regulation are still in their infancy and therefore little is known in respect to longer-term efficacy. It nevertheless remains our position that until there is a single piece of stand-alone 'building' legislation that operates in its own sphere distinctly and discretely from NSW planning legislation there will continue to be needed additional 'reform' that has now persisted for over two decades to fix the failures of a broken system.

Whilst the introduction of these new provisions and powers of the Building Commissioner are welcome, the detailed provisions are extremely complex and, in my view, are likely to either stifle some developments or require intervention by Councils when things go wrong or are missed due to these complexities.

In addition, most of the recently introduced reforms only apply to certain Class 2 multi-storey residential developments (or mixed-use developments), which is a good starting-point. However, it is necessary to implement appropriate equivalent controls and rigour to all classes of buildings, including Class 1, 3 and 9 buildings.

In Council's view, whilst there are many very competent and professional building certifiers in the private-sector, there are still many which are less so. They do not appear to understand their role as an independent public official. They provide an inadequate level of oversight of the development, fail to take appropriate and prompt action in respect of any non-compliances (unless encouraged or advised by Council to do so). And, importantly fail to adequately investigate, action and respond to community complaints.

(b) - The efficacy and adequacy of the government's regulation of building standards and specifically – any other matters

Rightly so, the current suite of reforms have been concentrated on the increased regulation of the construction of residential apartment development. However, we believe that this needs to be expanded to provide better regulation of other residential development (i.e. Class 1 buildings).

Like many other Council areas, across the City of Randwick the 'lion's share' of residential development on a project-by-project basis is low-rise Class 1 building construction which is increasingly being carried out under a *complying development certificate* issued by private certifiers relying of the various residential development 'codes' contained in the *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (the Codes SEPP).

Since the Codes SEPP was introduced in December 2008, it has been amended on over seventy (70) occasions. Most of these amendments have been to expand the types of development that can be carried out as either *exempt development* or *complying development.* What was, initially, a common-sense apportionment of relatively benign low-impact residential and commercial alterations and additions away from the 'full-blown' Development Application process, has now manifest to encompass multi-million-dollar medium size low-rise residential building projects approved and certified, in most cases, by the same private entity. Not only is this type of development changing the local character of streets and suburbs, but it is also happening in a regulatory vacuum.

Over the past two years Randwick City Council's building and compliance officers are increasingly being required to intervene to address concerns which have been raised by residents affected by complying development. Predominantly this is because the issues raised have not been address by the private certifier for that development and it is then left to Council to act as the intermediary between disgruntled residents and the development's certifier. Council receives numerous complaints from residents advising that the appointed certifier will not respond to their concerns or provide information about the development (or complying development proposal) and the community expect Council to intervene and assist in resolving the matter, whatever it may be.

While certifiers are compelled to issue written directions for 'non-compliances' this is only required once the certifier 'becomes aware' of a 'non-compliance' outside of the mandatory inspections' regime (see s. 6.31 of the EP&A Act, and cl. 161A of the EP&A Reg). However, the illogicality of the 'directions' provisions is that, in reality, the only time a certifier is compelled to attend the building site is to conduct a mandatory inspection of which there are only six prescribed circumstances. It is our experience that certifiers are, for whatever reason, reluctant to carrier out a site inspection to investigate concerns raised by a nearby resident and it is usually only after the dissatisfied nearby resident has contacted Council, usually out of frustration with the response, or lack thereof, from the certifier that any meaningful action is taken. It is our position that in addition to being compelled to issue written directions in respect to non-compliances, there should also be a requirement for certifiers to promptly investigate concerns that are legitimately raised in respect to alleged non-compliances. When this does not happen Councils should be given the power to compel the certifier to conduct a compliance investigation. It is after all the certifier's statutory responsibility to ensure that the building work is carried in accordance with the relevant development approval.

In addition, there is now the very real issue of how Councils will continue to fund their compliance and enforcement functions. Councils for many, many years have adopted development compliance fees and applied those fees to the granting of a Development Consent. With the recent commencement of the *Environmental Planning and Assessment Amendment (Compliance Fees) Regulation 2021*, Councils, from the 31 December this year, will be prohibited from charging these fees. Instead, Councils will be left to rely solely on recovering development compliance and enforcement costs through the largely unworkable Compliance Costs Notice provisions of the EP&A Act which, in effect, only apply after a Development Control Order is given. Again, in reality, most compliance issues are resolved without giving a Development Control Order but not without expending significant costs and resources associated with compliance investigations, complaints management and the time and expense of liaising with a development's proponent, certifier, consultants and builder. It is our view that the current

Compliance Costs Notice provisions need to be simplified with the maximum amounts payable as prescribed by cl. 218C of the EP&A Reg being significantly increased. In addition, the Compliance Cost process is so complex and resource intensive that only a few Councils even bother with them. And those that do, only obtain a miniscule level of income, which in my view, is a waste of time and precious resources.

Conclusion

The proclivity of successive Governments to continually amend, add to, expand and increase the scope of regulation required to administer and supervise the construction industry ignores what has been called for in just about every report into the NSW building system since the inception of private building certification in 1998. That is, the need for a separate stand-alone piece of building legislation that is completely 'uncoupled' from the convoluted, multi layered, complex NSW Planning System.

A stand-alone system, unlike the current one imbedded in the State's Planning System, should regulate the construction of ALL classes of buildings (not just Class 2 high-rise buildings), all building practitioners and certifiers, contain distinct regulatory jurisdictions and not the current 'blurred' jurisdictional mashing of responsibilities between the various consent authorities, building practitioner accreditation bodies, licensing authorities and other State agencies, to properly accredit, licence, audit, supervise and enforce all facets of the construction industry.

Until there is a system in NSW which does not confuse, but distinguishes between, the town planning process to approve the use and development of land and the 'mechanics' that comes with constructing buildings, so will remain the confusion of the role of certifiers and other building professionals, the inherent conflicts of interest that exist between developers and their certifiers, a too heavily weighted 'paper based' system of building compliance with next to no effective regulatory oversight that allows for the use of non-conforming building products and the inappropriate and substandard methods of construction absent of any meaningful independent scrutiny.

Also confusing is the Government rhetoric about getting tough on private certifiers which is somewhat perplexing given that it is the Government's own planning system that is constantly expanding to permit more and larger types of development to be approved and certified by one of the entities it contends needs greater regulation. Private Certifiers can now, under various State Environmental Planning Instruments, not only 'certify' but approve, as Complying Development, a range of commercial, industrial and housing development including retail liquor outlets, warehouse and distribution centres and other large industrial development, major additions to schools and other educational institutions, group homes, low rise density housing development, dual occupancies, and the list goes on. If the rhetoric is true and not just convenient political scapegoating to disguise a failed system, then the current private certifiers' powers to approve and then certify the same development should be 'wound back' and the approval process returned to local government to control this type of 'character' changing development that is being carried out across our communities.

We do not pretend that to fix the current system of building regulation in NSW will be anything less than an enormous challenge. However, unless this challenge is taken up the problems that have beset the NSW building industry, which have been endlessly documented and reported on for the last two decades will continue.

We trust this submission is of assistance to the Committee's Inquiry.

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